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No. 87-1195

IN THE

Supreme Court of the United States

October Term 1987

JAMES MALCOLM WILLIAMS,

Appellant,

vs.

LAWYERS PROFESSIONAL RESPONSIBILITY BOARD, STATE OF MINNESOTA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

MOTION TO DISMISS OF APPELLEE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

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QUESTIONS PRESENTED

1. Did the Minnesota Supreme Court err in holding that Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7), Minnesota Code of Professional Responsibility, did not violate the first amendment of the United States Constitution as applied to an attorney who, notwithstanding the admonitions of a trial judge, repeatedly asked questions that were argumentative, irrelevant, repetitive, without foundation or degrading to the witness?

2. Did the Minnesota Supreme Court violate Appellant's first amendment rights by disciplining him for conduct which occurred at a disciplinary probable cause hearing and which the court characterized as obstreperous, disruptive and abusive, in violation of Rule 3.5(h), Rule 4.4 and Rule 8.4(d), Minnesota Rules of Professional Responsibility?

3. Did the Minnesota Supreme Court err in holding that Disciplinary Rule 7-106(C)(5) and (6), as applied to discipline an attorney for a racial slur against an opposing counsel when the opposing counsel was not disciplined for his response, did not violate the equal protection clause of the fourteenth amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

Appellant: James Malcolm Williams is an attorney licensed to practice law in the State of Minnesota and was denominated respondent in the proceeding below.

Appellee: The Lawyers Professional Responsibility Board is the agency established by the Minnesota Supreme Court to investigate allegations of attorney misconduct and impairment and to prosecute disciplinary proceedings when warranted.

REPORT OF THE OPINION BELOW

The opinion below is reported at 414 N.W.2d 394 (Minn. 1987), *sub nom. In re Williams.*

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding	ii
Report Of The Opinion Below	ii
Table Of Authorities	iv
Motion To Dismiss	1
Constitutional Provisions And Rules	2
Statement Of The Case	2
Argument	5
I. The Minnesota Supreme Court's Decision That Disciplining Appellant For His In-Court Utterances Did Not Deprive Him Of His Right To Free Speech Is Plainly Correct, And Appellant's Arguments To The Contrary Fail To Raise A Substantial Federal Question	5
A. The Rules Of Professional Conduct At Issue Here Are Not Vague Because They Give Attorneys Notice Of The In-Court Utterances Which They Proscribe	5
B. The Rules Are Not Overbroad Because They Only Proscribe In-Court Utterances Which Interfere With The State's Legitimate Interest In The Fair Administration Of Justice	12
C. The Rules, As Applied To Appellant's In-Court Utterances, Did Not Deprive Him Of His Right To Free Speech Because His Utterances Were	

Page

Patently Beyond The Scope Of First Amendment Protection 16

II. The Minnesota Supreme Court's Decision That Disciplining Appellant For A Racial Slur Against An Opposing Counsel Did Not Deprive Him Of His Right To Equal Protection Under The Law Is Plainly Correct, And Appellant's Arguments To The Contrary Fail To Raise A Substantial Federal Question 18

Conclusion 19

TABLE OF AUTHORITIES

Minnesota Regulations:	Page
Minnesota Code of Professional Responsibility	
Disciplinary Rule 7-106(C)	*passim*
Minnesota Rules of Professional Conduct	
Rule 3.5(h)	*passim*
Rule 4.4	*passim*
Rule 8.4(d)	*passim*
Rules of Uniform Decorum in the District Court	10

Federal Cases:	
Connally v. General Construction Co.,	
269 U.S. 385 (1926)	6
Ex Parte Secombe,	
60 U.S. (19 How.) 9 (1856)	6
Fisher v. Pace,	
336 U.S. 155, 159 (1949)	12, 13
Grayned v. City of Rockford,	
408 U.S. 104 (1972)	6, 12
Hynes v. Mayor of Oradell,	
425 U.S. 610 (1976)	6
In re Bithoney,	
486 F.2d 319 (CA1 1973)	7
In re Ruffalo,	
390 U.S. 544 (1968)	6, 7, 11
In re Snyder,	
—— U.S. ——, 105 S.Ct. 2874 (1985)	8
Smith v. California,	
361 U.S. 147 (1959)	6
Spencer v. Dixon,	
290 F.Supp. 531 (W.D. La. 1968)	14

Page

Wayte v. U.S.,
—— U.S. ——, 105 S.Ct. 1524 (1985) 18
Zauderer v. Office of Disciplinary Counsel,
—— U.S. ——, 105 S.Ct. 2265 (1985) 6, 11

States Cases:
In re Freichs,
238 N.W.2d 764 (Iowa 1976) 15
In re Williams,
414 N.W.2d 394 (Minn. 1987) ..... *passim*
Sievert v. First Nat'l Bank in Lakefield,
358 N.W.2d 409 (Minn. Ct. App. 1984),
rev. denied (Minn. Feb. 5, 1985) 2

Other Authorities:
ABA Code of Professional Responsibility:
Void for Vagueness?
57 N.C.L. Rev. 671 (1979) 7
Minnesota Civil Trialbook 10

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MOTION TO DISMISS OF APPELLEE MINNESOTA LAWYERS PROFESSIONAL RESPONSIBILITY BOARD

Appellee Minnesota Lawyers Professional Responsibility Board, pursuant to Rule 16 of the Rules of The Supreme Court of the United States, moves to dismiss the appeal herein on the ground that the questions presented were correctly resolved by the Minnesota Supreme Court and are so insubstantial that no further argument is needed.

CONSTITUTIONAL PROVISIONS AND RULES

The applicable provisions of the United States Constitution are the first and fourteenth amendments. The pertinent clauses are set forth in Appellant's Jurisdictional Statement. Jur. Stat. at 7.[1]

The applicable rules are Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7), Minnesota Code of Professional Responsibility, and Rules 3.5(h), 4.4, and 8.4(d), Minnesota Rules of Professional Conduct.[2] Jur. Stat. at 7-9.

STATEMENT OF THE CASE

Appellant appeals from a decision of the Minnesota Supreme Court publicly reprimanding him and suspending him from the practice of law for six months. *In re Williams*, 414 N.W.2d 394, 399 (Minn. 1987) (hereinafter *Williams*).

The disciplinary action against Appellant was based on three separate counts of unprofessional conduct. The first count concerned Appellant's conduct during a trial in which he represented the plaintiffs. *See Sievert v. First Nat'l Bank in Lakefield*, 358 N.W.2d 409 (Minn. Ct. App. 1984), *rev. denied* (Minn. Feb. 5, 1985). The Minnesota Supreme Court found that during Appellant's cross-examination of witnesses, his questions were repeatedly argumentative or without foun-

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[1] Throughout this motion, the abbreviation "Jur. Stat." refers to Appellant's Jurisdictional Statement.

[2] By order dated June 13, 1985, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct effective September 1, 1985, and repealed the Minnesota Code of Professional Responsibility effective August 31, 1985. Appellant's conduct which occurred prior to September 1, 1985, was charged under the old Code. Conduct subsequent to that date was charged under the new Rules.

dation, attempted to characterize unfairly the witnesses' testimony, or were crude attempts to demean or personally attack the witnesses. *Williams*, 414 N.W.2d at 396. After review of the 2900-page trial transcript, the court concluded that Appellant had engaged in calculated tactics to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. The Court held that to corrupt the trial process in this manner is prejudicial to the administration of justice and unprofessional conduct. *Id.* at 397.

Appellant argued that his trial conduct was an exercise in free speech and that to impose discipline amounted to unconstitutional censorship. In addressing his arguments, the Minnesota court distinguished an attorney's protected out-of-court speech as a private citizen from his speech in the court room as an officer of the court. The court properly determined that when an attorney is in court, engaged in court business, appropriate rules of professional conduct may govern an attorney's speech without offending the first amendment. *Id.* at 397.

The second count of unprofessional conduct involved Appellant's behavior at a pre-trial deposition of one of his clients in the *Sievert* matter. During a heated exchange with his opposing counsel, Appellant characterized opposing counsel's conduct as "your little sheeny Hebrew tricks." Opposing counsel then called Appellant a "son of a bitch." *Id.* at 397-398.

Appellant argued that disciplining him for his racial slur, when opposing counsel was not disciplined for his response, denied him equal protection under the law. The Minnesota court properly rejected this argument on the basis that the opposing counsel's response was understandably provoked by Appellant's own conduct. *Id.* at 398.

The third count of unprofessional conduct against Appellant involved his behavior at a hearing before a three-member panel of the Lawyers Professional Responsibility Board. The purpose of the hearing was to determine whether probable cause existed for disciplining Appellant for his conduct at the *Sievert* trial. During the hearing, Appellant repeatedly interrupted the panel chair, accused him of lying, and called him "a disgrace to our profession." The Minnesota court found that Appellant had engaged in obstreperous, disruptive and abusive conduct in violation of Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct. *Id.* at 398.

Appellee submits this motion to dismiss the appeal herein on the ground that the Minnesota Supreme Court correctly resolved Appellant's questions and that Appellant has failed to raise a substantial question warranting review by this Court.

ARGUMENT

I. THE MINNESOTA SUPREME COURT'S DECISION THAT DISCIPLINING APPELLANT FOR HIS IN-COURT UTTERANCES DID NOT DEPRIVE HIM OF HIS RIGHT TO FREE SPEECH IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Minnesota Supreme Court correctly found no merit to Appellant's argument that disciplining him for his in-court utterances deprived him of his first amendment right to free speech. Disciplinary Rule 7-106(C)(1), (2), (5), (6) and (7) of the former Minnesota Code of Professional Responsibility and Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct do not offend the first amendment. First, the rules are not vague because they sufficiently inform attorneys of prohibited conduct. Second, the rules are not overbroad because they place no greater limitation on an attorney's in-court utterances than is necessary or essential to protect the fair administration of justice. Finally, the rules were properly applied to Appellant's utterances both at the *Sievert* trial and at his probable cause hearing, because the utterances for which he was disciplined were clearly unprotected by the first amendment.

A. The Rules Of Professional Conduct At Issue Here Are Not Vague Because They Give Attorneys Notice Of The In-Court Utterances Which They Proscribe.

The rules at issue herein are not impermissibly vague. As the following will show, Disciplinary Rule 7-106(C) gives specific and definite notice to attorneys of the speech it proscribes by its reference to local rules of practice and decorum

and the rules of evidence. Rules 3.5(h), 4.4 and 8.4(d) give notice of the kind of conduct they proscribe by their use of standards which take on clarity and precision in the context of the traditions of legal profession.

This Court has long recognized that "it is difficult, if not impossible, to enumerate and define with legal precision, every offense for which an attorney or counselor ought to be removed." *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1856). Yet essential due process guarantees apply fully to attorney disciplinary proceedings. *In Re Ruffalo*, 390 U.S. 544, 550 (1968).

The due process standards applicable to rules governing attorney conduct were summarized by Justice Brennan in his partial dissent and partial concurrence in *Zauderer v. Office of Disciplinary Counsel*, —— U.S. ——, 105 S.Ct. 2265, 2289-90 (1985) (n.8 omitted):

> A regulation that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). The Fourteenth Amendment's Due Process Clause "insist[s] that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108-109 (1972). This requirement "applies with particular force in review of laws dealing with speech," *Hynes v. Mayor of Oradell*, 425 U.S. 610, 620 (1976); "a man may be the less required to act at his peril here, because the free dissemination of ideas may be the loser," *Smith v. California*, 361 U.S. 147, 151 (1959).
>
> . . .

> Given the traditions of the legal profession and an attorney's specialized professional training, there is unquestionably some room for enforcement of standards that might be impermissibly vague in other contexts; an attorney in many instances may properly be punished for "conduct which all responsible attorneys would recognize as improper for a member of the profession." [*In re Ruffalo*, 390 U.S.] at 555 (WHITE, J., concurring in result)*
>
> * Arguably vague regulations may take on "definiteness and clarity" in the context of the profession's "complex code of behavior," and an attorney is properly charged with knowledge of all applicable disciplinary rules and ethical guidelines. *In re Bithoney*, 486 F.2d 319, 324-325 (CA1 1973). See also Comment, ABA Code of Professional Responsibility: Void for Vagueness?, 57 N.C.L. Rev. 671, 676-680 (1979).

In that portion of *Ruffalo* cited by Justice Brennan, Justice White considered whether it was proper to disbar Ruffalo under a general standard of the Court of Appeals for the Sixth Circuit. The standard included "conduct unbecoming a member of the bar of the court." *Ruffalo*, 390 U.S. at 555. Justice White reasoned that even when a disbarment standard is as unspecific as that of the Sixth Circuit, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment, including conduct which all responsible attorneys would recognize as improper for a member of the profession. *Id.* at 555.

In another case, the Court stated as follows regarding the meaning of "conduct unbecoming a member of the bar":

> Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.

In re Snyder, —— U.S. ——, 105 S.Ct. 2874, 2881 (1985) (note omitted). Moreover, *Snyder* acknowledged that an attorney's obligation to avoid conduct that is "prejudicial to the administration of justice" is almost universally recognized in American jurisdictions. *Id.* note 6.

In the present case, the disciplinary rules challenged by appellant clearly put responsible attorneys on notice of the speech they prohibit so that attorneys may act accordingly. The pertinent provisions of Disciplinary Rule 7-106(C)[3] provide as follows:

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[3] As noted above, the Minnesota Supreme Court adopted the Minnesota Rules of Professional Conduct, which became effective on September 1, 1985 and simultaneously repealed the Code of Professional Responsibility. All of Appellant's conduct at the *Sievert* trial which forms the basis of his suspension under Count I occurred while the old Code was still in effect. The prosecuting attorney for Appellee charged the conduct as unprofessional under Rule 7-106 of the old Code, and the referee utilized Rule 7-106 in that portion of his report to the Supreme Court concerning the *Sievert* trial. Jur. Stat. at 32a. In its opinion, however, the Minnesota court cites Rules 3.5(h), 4.4, and 8.4 as the rules "found to have been violated" by Appellant's trial conduct. *In re Williams*, 414 N.W.2d at 395, n.2; Jur. Stat. at 3a. Despite this ambiguity, it must be assumed that the Minnesota court concluded that Appellant's trial conduct was unprofessional under Rule 7-106(C) of the old Code of Professional Responsibility, since the *Sievert* trial

In appearing in his professional capacity before a tribunal, a lawyer shall not:

(1) State or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.

(2) Ask any question that he has no reasonable basis to believe is relevant to the case and that is intended to degrade a witness or other person.

. . .

(5) Fail to comply with known local customs of courtesy or practice of the bar or a particular tribunal without giving to opposing counsel timely notice of his intent not to comply.

(6) Engage in undignified or discourteous conduct which is degrading to a tribunal.

(7) Intentionally or habitually violate any established rule of procedure or of evidence.

Minnesota Rules of Professional Conduct 3.5(h), 4.4 and 8.4(d) provide as follows:

Rule 3.5(h): A lawyer shall not engage in conduct intended to disrupt a tribunal.

Rule 4.4: In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

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conduct was charged and considered by the Referee under Rule 7-106(C). Moreover, Appellant has used Rule 7-106(C) to frame his questions to this Court and has not raised any issues which may be implicated by the application of the new Rules to his conduct at the *Sievert* trial.

> Rule 8.4: It is professional misconduct for a lawyer to . . . (d) engage in conduct that is prejudicial to the administration of justice.

Disciplinary Rule 7-106(C) clearly informs an attorney that certain in-court utterances, including questions to witnesses will be unprofessional conduct. Section (1) proscribes stating or alluding to irrelevant and inadmissible matters. Section (2) proscribes questions that are irrelevant or intended to degrade witnesses or other persons. Terms such as "relevant" and "supported by admissible evidence" are defined by rules of evidence and case law so that the rule's proscriptions are clear to all members of the bar as a result of their professional training. The term "to degrade a witness or other person" is given clarity by an attorney's traditional obligation to treat witnesses and parties with courtesy and to avoid questions that are designed to demean or humiliate.

Section (5) of Rule 7-106(C) incorporates local customs of courtesy or practice. Such customs are codified in part in Minnesota in the Rules of Uniform Decorum in the District Court and the Minnesota Civil Trialbook.[4] All members of the Minnesota bar may be charged with knowing their contents.

Section (6) proscribes undignified or discourteous conduct which degrades the tribunal. The speech which the rule would proscribe is defined by the traditional code of behavior, known to all attorneys, which condemns rude, insulting, and familiar address to the court. Finally, section (7) is given clarity and precision by its explicit incorporation of the rules of procedure and evidence for the Minnesota courts.

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[4] The Rules of Uniform Decorum and the Minnesota Civil Trialbook may be conveniently located in *Minnesota Statutes* (1986), Volume 9, pages 314-340.

Disciplinary Rules 3.5(h), 4.4, and 8.4(h) are also not facially vague. As noted above, the rules cannot enumerate or define with precision every offense which rises to unprofessional conduct. The rules do, however, incorporate standards by which attorneys may know which utterances are proscribed. Rule 3.5(h) only prohibits in-court speech which disrupts a tribunal. Rule 4.4 only prohibits in-court speech whose purpose is to embarrass, delay or burden a third person. Finally, Rule 8.4 only prohibits in-court speech which is prejudicial to the administration of justice.

Thus, the standards incorporated in Rules 3.5(h), 4.4, and 8.4(d) operate to proscribe speech according to its purpose, rather than its content. The impermissible purposes, such as "to disrupt a tribunal" or "to embarrass, delay, or burden a third person," are not impermissibly vague in the context of the profession's code of behavior. *See Zauderer*, 105 S.Ct. at 2290, n.9. Members of the Minnesota bar can be assumed to know that certain kinds of speech, uttered in the court room for the proscribed purposes, would be recognized by all responsible attorneys as improper for a member of the profession. *See 4 Ruffalo*, 390 U.S. at 555.

In conclusion, the disciplinary rules at issue here are not impermissibly vague. Rule 7-106(C) explicitly incorporates local rules of decorum, procedure and evidence. Moreover, both Disciplinary Rule 7-106(C) and Rules 3.5(h), 4.4, and 8.4(d) employ standards which are clear and precise in the context of the legal profession.

B. The Rules Are Not Overbroad Because They Only Proscribe In-Court Utterances Which Interfere With The State's Legitimate Interest In The Fair Administration of Justice.

Rules 3.5(h), 4.4 and 8.4(d) are not overbroad.[5] The rules are narrowly drawn so that they only proscribe in-court speech which would interfere with the state's legitimate interest in the fair administration of justice.

The Court has never addressed the question of when rules of professional conduct deny first amendment guarantees of free speech when such rules govern the in-court speech of attorneys. However, a clear and precise enactment may nevertheless be overbroad if in its reach it prohibits constitutionally protected conduct. *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). Enactments which regulate speech are not overbroad if they are narrowly tailored to further the state's legitimate interest. *Id.* at 116-17. The Court's dicta in the following two cases establishes that protecting the orderly administration of justice is a sufficiently compelling interest which allows the state to regulate the content of in-court speech that jeopardizes that interest. Since the regulations at issue are narrowly drawn to serve only that interest and prohibit only speech that is properly subject to regulation, they are therefore not overbroad.

In *Fisher v. Pace*, the Court affirmed a decision of the Supreme Court of Texas which sustained a trial court's sum-

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[5] Since the Code of Professional Responsibility was repealed effective August 31, 1985, Disciplinary Rule 7-106(C) no longer regulates the in-court speech of attorneys in Minnesota. It is therefore not necessary to consider whether Disciplinary Rule 7-106 was overbroad. It's constitutionality, as applied, is discussed below.

mary conviction of an attorney for contempt in the face of the court. 336 U.S. 155, 159 (1949). The conduct at issue was the attorney's continuing a course of argument in his closing summation to a jury after objections had been repeatedly sustained by the bench. *Id.* at 156-59. Writing for the majority, Justice Reed noted as follows:

> The occurrence must be viewed as a unit in order to appraise properly the misconduct, and the relationship of the petitioner as an officer of the court must not be lost sight of.

Id. at 161. Commenting on the attorney's failure to conform his summation to a local rule after repeated rulings by the trial judge, the Court stated:

> It was the duty and power of the trial judge in the trial of the compensation suit to determine the type, manner and character of the argument before the jury. Of course his rulings thereon were subject to review in the appellate courts, but he has the power to make them whether right or wrong. If they are erroneous the injured party has the plain, simple and adequate remedy of appeal. It was thus the duty of counsel to abide by his decisions even if erroneous; and if any rights of his clients were violated the remedy was by exception and appeal. Any other procedure would result in mockery of our trial courts and would destroy every concept of orderly process in the administration of justice.

Id. at 161.

The themes first articulated in *Fisher* in 1949 were recently reiterated in the Court's dicta in *In re Snyder*, —— U.S. ——, 105 S.Ct. 2874, 2881 (1985):

> As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of

> admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice.

Thus the Court has viewed attorneys as having a special relationship to the courts because of the attorney's status as a participant in the judicial system. As participants, attorneys have access to appellate forums in which to redress the errors of courts or to call attention to injustice. Attorneys therefore have an obligation to abide by judicial decisions and to maintain decorum. An attorney's failure to do so threatens orderly process in the administration of justice.

Although this Court has not defined the scope of first amendment protection for an attorney's in-court speech, two lower courts have considered the question with respect to statements made in pleadings filed with the court which may be viewed as in-court utterances. In the context of a contempt proceeding, the United States District Court for the Western District of Louisiana held that irrelevant, insulting, abusive or grossly discourteous language in criticism of a judge or officer of the court, in a pleading filed with the court, has no constitutional protection. *Spencer v. Dixon*, 290 F.Supp. 531, 537 (W.D. La. 1968). The Iowa Supreme Court has held that an accusation in a filed pleading that the court has practiced fraud and deceit is not protected by the first amendment. *In*

re Freichs, 238 N.W.2d 764 (Iowa 1976). Although these decisions were not tested by review in this Court, they do illustrate that disciplinary rules which regulate an attorney's in-court statements reach only so far as is necessary to protect orderly process and the fair administration of justice.

Rules 3.5(h), 4.4 and 8.4(d) of the Minnesota Rules of Professional Conduct are not overbroad. They place no greater limitation on an attorney's in-court speech than is necessary to protect orderly process in the fair administration of justice. Rule 8.4(d) explicitly incorporates that standard in its text. Thus Rule 8.4(d) cannot be viewed as overbroad, since the rule can only proscribe speech that is prejudicial to the administration of justice. Such speech cannot have first amendment protection.

Rules 3.5(h) and 4.4 do not explicitly incorporate the above standard. However, Rule 3.5(h), by proscribing only conduct which is intended to disrupt a tribunal, cannot be construed to reach protected speech. Language employed to disrupt a tribunal would necessarily be language which threatens orderly process and the fair administration of justice. Such language is outside the scope of first amendment protection.

Similarly, Rule 4.4 cannot be construed as overbroad. It can only be read to proscribe in-court speech which has as its purpose to embarrass, delay or burden a third person, such as a witness in a court proceeding. In-court utterances whose purpose is to embarrass or burden a witness can only rationally be viewed as threatening orderly process in the fair administration of justice.

The rules are thus not facially overbroad. The rules only proscribe speech which is prejudicial to the administration of justice. Appellant has therefore failed to raise a substantial first amendment question, and his appeal should be dismissed.

C. The Rules, As Applied To Appellant's In-Court Utterances, Did Not Deprive Him Of His Right To Free Speech, Because His Utterances Were Patently Beyond The Scope Of First Amendment Protection.

As noted above, the Court has not delineated the scope of first amendment protection for an attorney's in-court speech. This case presents no opportunity to do so. The in-court utterances which resulted in Appellant's suspension are so patently unprofessional that they cannot be used to illuminate the content of protected in-court speech.

Several examples of Appellant's unprofessional speech at the *Sievert* trial are set forth in the margin of the Minnesota court's decision. *Williams*, 414 N.W.2d at 396; Jur. Stat. at 4a-7a. Further examples are set forth in the Referee's report to the Minnesota Supreme Court. Jur. Stat. at 21a-24a. The full 2900-page transcript of the *Sievert* trial was also reviewed *de novo* by the Minnesota court.

It is clear from the Court's decision that Disciplinary Rule 7-106(C) was not applied to any in-court utterances that could rationally be viewed as protected by the first amendment. Appellant was not disciplined for any single improper question to a witness. Rather, Appellant's in-court utterances, viewed as a whole, rose to unprofessional conduct because they tainted the record of the trial:

> An argumentative question is improper and unfair because it argues the evidence rather than seeking to elicit evidence from the witness. Argument is reserved for counsel to make, not to the witness, but to the trier of fact after the facts are adduced. During the stress of a trial, for one reason or another, it may happen that argumentative questions will be asked, but the trial judge is

> ordinarily able to handle the situation by sustaining an objection, striking improper remarks, or cautioning the jurors.
>
> But here Respondent's questions went far beyond what is excusable or tolerable. Almost every page of the transcript of Respondent's cross-examination of Mr. Meyer shows improper questioning, which in turn led to inevitable objections by opposing counsel, conferences at the bench or in chambers, confusion, posturing before the jurors, and a record tainted with unfounded insinuations and innuendo.

Williams, 414 N.W.2d at 396-397. The court concluded that Respondent engaged in calculated trial techniques to provoke and bait opposing counsel, intimidate and demean witnesses, and obfuscate the record. The court correctly held that to corrupt the trial process in this manner is prejudicial to the administration of justice and therefore unprofessional conduct. *Id.* at 397.

At Appellant's disciplinary probable cause hearing, his unprofessional speech included the following:

> 1. Persisting in interrupting the chairman after being told to stop talking;
>
> 2. Accusing the chairman of lying when the chairman said Appellant was argumentative and interrupting; and
>
> 3. Stating that he considered the panel chairman "a disgrace to our profession."

Williams, 414 N.W.2d at 398. The Minnesota court, after listening to an audio tape of the proceeding and reading the transcript, concluded that Appellant had intentionally sought to disrupt the hearing. *Id.*

Appellant's in-court utterances in both forums, viewed as whole occurrences, caused such an egregious subversion of orderly process that they clearly constituted a serious and imminent threat of interference with the fair administration of justice. Thus, the Minnesota court did not err in concluding not only that Appellant's in-court speech constituted unprofessional conduct but also that such speech was not protected by the first amendment. Appellant has therefore failed to raise a substantial question, and his appeal should be dismissed.

II. THE MINNESOTA SUPREME COURT'S DECISION THAT DISCIPLINING APPELLANT FOR A RACIAL SLUR AGAINST AN OPPOSING COUNSEL DID NOT DEPRIVE HIM OF HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW IS PLAINLY CORRECT, AND APPELLANT'S ARGUMENTS TO THE CONTRARY FAIL TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Minnesota Supreme Court correctly held that disciplining Appellant for using a racial slur against his opposing counsel, when the opposing counsel was not disciplined for his response, did not deny Appellant the right to equal protection under the law as guaranteed by the fourteenth amendment.

A claim of selective prosecution must meet two requirements: first, the enforcement system must have a discriminatory effect; and two, the enforcement system must be motivated by a discriminatory purpose. *Wayte v. U.S.*, —— U.S. ——, 105 S.Ct. 1524, 1531 (1985).

In the present case, Appellant has not met the required test. Indeed, he did not even attempt to establish in the court below that Appellee's "enforcement system" is discriminatory. Nor could he make such a showing. His claim is based on a single

prosecutorial decision which was patently sound in view of Appellant's provocative use of the phrase, "your little sheeny Hebrew tricks."

Appellant has thus failed to raise a substantial federal question regarding selective prosecution. His appeal should therefore be dismissed.

CONCLUSION

For the foregoing reasons, Appellee respectfully submits that the questions presented herein were correctly decided by the Minnesota Supreme Court and that this appeal presents no substantial question warranting review by this Court. The appeal should therefore be dismissed.

Dated: February 22, 1988

Respectfully submitted,

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